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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 01 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Japanese hair salon. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel states that the petitioner has paid the proffered wage to the beneficiary and to another employee who held the same position previously, and states that the personal financial resources of the petitioner's owner should be considered as financial resources of the petitioner.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 26, 2001. The proffered wage as stated on the Form ETA 750 is $28,000.00 per year. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1992, to have a gross annual income of $1,256,810.00, and to currently have 27 employees.

In support of the petition and in response to a request for evidence submitted by the director, the petitioner submitted the following evidence: a letter dated August 20, 2002 from the petitioner's president confirming an offer of permanent employment to the beneficiary; a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001; a copy of the petitioner's Form CT-4-S New York S Corporation Franchise Tax Return for 2001; a copy of the petitioner's Form NYC 4S General Corporation Tax Return for

2001; a copy of the Form 1120S U.S. Income Tax Return for an S Corporation of Miyatan Hair Styling Salon, Inc., for 2001; a copy of Form CT-4-S New York S Corporation Franchise Tax Return of Miyatan Hair Styling Salon, Inc., for 2001; copies of the petitioner's Form 941 employer's quarterly federal tax returns for the last quarter of 2001, all four quarters of 2002, and the first two quarters of 2003 (submitted in two overlapping packets); copies of the Form 941 employer's quarterly federal tax returns of [redacted], for the last quarter of 2001, all four quarters of 2002 and the first two quarters of 2003 (submitted in two overlapping packets); a letter dated July 25, 2002 from a former employer of the beneficiary in Scarsdale, New York, confirming the beneficiary's employment as an assistant manager from June 1996 to June 2002; copies of pay records of the petitioner for the beneficiary's employment for the months of September, October and November 2003; a copy of a letter dated December 19, 2003 from a certified public accountant; copies of statements from Chase Bank for an account of the petitioner for the months of July 2002 through June 2003; copies of payroll records for [redacted] showing figures for the year 2002 through December 31, 2002 and for the year 2003 through September 30, 2003; copies of statements issued by The Bank of New York for an account of [redacted], for the months of June 2002 through May 2003; copies of printouts of pages from the petitioner's Internet web site; and copies of printouts of pages from an Internet web site of [redacted] a radio talk show hostess, which include a favorable discussion of the petitioner's hair treatment method.

In a decision dated February 9, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and the following documents: copies of Form W-2 wage and tax statements showing compensation paid by the petitioner to an employee in 2000, 2001 and 2002; a copy of the petitioner's payroll record for the monthly pay period ending April 30, 2002; a copy of the Form 1120 U.S. Income Tax Return for an S Corporation of [redacted] for 2002; a copy of Form CT-3-S New York S Corporation Franchise Tax Return of [redacted] for 2002; and duplicate copies of some of the documents previously submitted for the record.

Counsel states on appeal that the petitioner has paid the proffered wage to the beneficiary and to another employee who held the same position previously, and that those facts establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Moreover, counsel states that the petitioner is an S corporation wholly owned by a single individual and that the personal financial resources of the petitioner's owner as well as the financial resources of another S corporation owned by the same owner should be considered as resources available to the petitioner to pay the proffered wage.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, counsel asserts in his brief that the petitioner began employing the beneficiary in September 2003. Counsel's assertion is supported by monthly payroll records of the petitioner for September, October and November 2003. Although pay period dates on each record are stated as beginning on the 16th of each month, the pay and tax figures on each record indicate that each record represents a full month. Those payroll records indicate that the beneficiary was paid at the rate of $675.00 per week, which is equivalent to an annual rate of

$35,100.00. That amount is greater than the proffered wage of $28,000.00. Therefore the payroll records for the beneficiary are sufficient to establish the petitioner's ability to pay the proffered wage during the months covered by those records. The petitioner makes no claim that it employed the beneficiary prior to September 2003.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The record contains a federal tax return for the petitioner only for 2001. No tax returns for other years were submitted. On the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001, the amount shown on line 28 for ordinary income is $21,741.00. Since that amount is less than the proffered wage, it fails to establish the petitioner's ability to pay the proffered wage during 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L attached to the petitioner's Form 1120S tax return for 2001 yield the following amounts for net current assets: -$6,913.00 for the beginning of 2001 and $12,065.00 for the end of 2001. Since the figure for the beginning of the year is negative and since the figure for the end of the year is less than the proffered wage, those figures also fail to establish the ability of the petitioner to pay the proffered wage.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

On the petitioner's bank statements the ending balances are as follows:

	Business checking ending balance	Line of credit outstanding balance
July 9, 2002	$2,230.79	$8,471.36
August 8, 2002	$15,838.38	$8,471.36
September 10, 2002	$14,297.59	$9,822.41
October 8, 2002	$10,727.26	$10,686.65
November 8, 2002	$27,898.64	$5,473.02
December 9, 2002	$6,903.92	$5,176.17
January 9, 2003	$17,467.02	$4,879.32
February 10, 2003	$12,934.05	$4,582.47
March 10, 2003	$0.00	$4,285.62
April 8, 2003	$12,226.48	$9,896.00
May 8, 2003	$11,159.48	$9,622.00
June 9, 2003	$7,167.20	$9,347.00

The ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Moreover, in several months the outstanding balance on the petitioner's line of credit is larger than the ending balance on its business checking account. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

In any event, no bank statements of the petitioner prior to July 2002 were submitted. The record contains no explanation for the absence of any bank statements for that period. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2001 or in the first half of 2002.

Counsel asserts that the petitioner paid the proffered wage to another employee who held the offered position prior to the employment of the beneficiary and that the compensation paid to that employee should be considered as evidence of the petitioner's ability to pay the proffered wage during that period. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The evidence submitted prior to the director's decision contains no information to support the assertion of counsel concerning compensation paid to an employee who allegedly held the offered position prior to the beneficiary.

The record includes a letter dated December 19, 2003 from a certified public accountant expressing the accountant's opinion that the petitioner has the ability to pay the proffered wage. The letter includes figures on the petitioner's gross sales and salary payments for 2001 and 2002. No audited financial statement accompanies the letter, nor does the letter state that the accountant's opinion is based on the results of an audit. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage

In his notice of appeal counsel states "Case law supports Petitioner having an off year and 2001 was a difficult year for many businesses in New York City." Counsel does not refer to any specific precedents of the AAO on this point, either in the notice of appeal or in counsel's brief.

Concerning the instant case, it is a matter of public record that many businesses in New York City experienced significant economic difficulties following the events of September 11, 2001. However, the record in the instant case contains no evidence which indicates that the petitioner's business was one of those negatively affected by the events of September 11, 2001. The priority date in the instant case is April 26, 2001, nearly five months prior to September 11, 2001. As noted above, petitioner's net current assets at the beginning of 2001 were -$6,913.00 and they rose to $12,065.00 at the end of 2001. The petitioner submitted no copies of bank statements for any month in 2001, nor for the first six months of 2002. Nor did the petitioner submit any other evidence relevant to counsel's assertion concerning events in 2001, or concerning any changes in the petitioner's business before or after the year 2001. The evidence therefore fails to establish that 2001 was an uncharacteristically unprofitable year for the petitioner.

Counsel asserts that the petitioner is an S corporation and that it is owned by a single individual. Counsel also asserts tha[redacted] is also an S corporation owned by that same individual. Each of those assertions is supported by information in the Form 1120S U.S. income tax returns for an S corporation of the petitioner and of [redacted] Counsel asserts that the financial resources of the owner and of [redacted] should be considered as resources available to the petitioner in any evaluation of the petitioner's ability to pay the proffered wage. Nonetheless, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, in the instant petition, the evidence pertaining to the financial resources of the petitioner's owner and to [redacted] will not be considered as evidence of the petitioner's ability to pay the proffered wage.

In his decision the director correctly analyzed the petitioner's federal tax return for 2001, and correctly found that the information on that return failed to establish the petitioner's ability to pay the proffered wage during that year, which is the year of the priority date. The director also correctly declined to consider evidence concerning the financial resources of the petitioner's owner and of [redacted] as evidence of the petitioner's ability to pay the proffered wage. The director failed to analyze the bank statements and other evidence aside from the petitioner's federal tax returns. However, this error by the director did not affect the director's decision on the petition, since, as discussed above, the evidence apart from the federal tax returns also fails to establish the petitioner's ability to pay the proffered wage. The decision of the director to deny the petition was therefore correct, based on the evidence then in the record.

On appeal, counsel submits additional evidence pertaining to the petitioner's ability to pay the proffered wage. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two above. In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by the RFE issued by the director of the need for evidence relevant to the petitioner's ability to pay the proffered wage. For the foregoing reasons, the evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764. Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director.

The evidence newly submitted on appeal includes copies of Form W-2 wage and tax statements showing compensation paid by the petitioner to an employee in 2000, 2001 and 2002. The employee is the person who counsel alleges held the offered position prior to the beneficiary. The W-2 forms for that employee show compensation paid by the petitioner of $33,720.00 in 2000, $30,990.00 in 2001, and $14,550.00 in 2002. The payroll record for the petitioner submitted on appeal for the monthly pay period ending April 30, 2002 shows the employee being paid at the rate of pay of $600.00 per week, which would amount to $31,200.00 per year. The compensation paid to that employee during the years 2000, 2001, and apparently 2002, was greater than the proffered wage. However, no evidence in the record supports counsel's assertion that that the position held by that employee was the same one offered to the beneficiary. The only evidence describing the beneficiary's proposed duties in the offered position is a letter dated August 20, 2002 from the petitioner's president, which was submitted with the initial filing of the I-140 petition. But that letter contains no mention of any other person who previously held the position, nor does the letter even say that the position for which the beneficiary is to be hired is a previously existing position. The evidence concerning the alleged predecessor employee is therefore insufficient to establish that compensation paid to that employee should be considered as evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing thereafter.

The evidence newly submitted on appeal also includes a copy of the Form 1120 U.S. Income Tax Return for an S Corporation of [redacted] for 2002; and a copy of Form CT-3-S New York S Corporation Franchise Tax Return of [redacted] for 2002. However, as noted above, the assets of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530.

The other evidence submitted on appeal consists of duplicate copies of documents submitted prior to the decision of the director. That evidence has been addressed above in the analysis of the evidence in the record before the director.

For the foregoing reasons, the evidence submitted on appeal fails to overcome the decision of the director.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.